

IN THE SUPREME COURT OF INDIA  
CIVIL ORIGINAL JURISDICTION  
WRIT PETITION (CIVIL) No. 829 OF 2013

S.G. VOMBATKERE & ANR.

.... PETITIONERS

VERSUS

UNION OF INDIA & ORS.

.... RESPONDENTS

SHORT NOTE OF SUBMISSIONS ON BEHALF OF  
THE PETITIONERS

**PAPER BOOK**

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**ADVOCATES FOR THE PETITIONERS : M/S. K.J. JOHN & CO.**

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**SHORT NOTE OF SUBMISSIONS ON BEHALF OF THE  
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1. These submissions are filed on behalf of the writ petitioners in the following petitions: -
  - a. **Writ Petition (Civil) No. 829 of 2013-** '*SG Vombatkere and Anr. v. Union of India and Anr.*'- challenging the Aadhaar programme initiated under a notification dated 28.01.2009.
  - b. **Writ Petition(Civil) No. 797 of 2016-** '*SG Vombatkere and Anr. v. Union of India and Anr.*'- challenging the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (the "Aadhaar Act")
  - c. **Writ Petition(Civil) No. 342 of 2017-** '*Shantha Sinha and Anr. v. Union of India and Anr.*'- challenging the Aadhaar Act and the notifications issued under Section 7 of the Aadhaar Act.
2. By an order dated 11.8.2015, a 3-Judge bench of this Hon'ble Court referred the petitions challenging the Aadhaar programme(including W.P. (Civil) No. 829 of 2013) to a bench of appropriate strength, *inter alia*,to scrutinize the *ratio decidendi* in *M.P. Sharma and Others v. Satish Chandra and Others* (1954 SCR 1077 – 8-

Judge) and *Kharak Singh v. State of U.P. and Others* (1964 (1) SCR 332 – 6-Judge) and the jurisprudential correctness of the subsequent decisions of the Supreme Court where the right to privacy is asserted or referred.

- 3(a) The Aadhaar Act, 2016 was enacted on 26.3.2016. Writ Petition (Civil) No. 797 of 2016 and Writ Petition (Civil) No. 342 of 2017 challenge the Aadhaar Act.
- 3(b) Rule Nisi was issued in thesetwo writ petitions on 28.10.2016 and 9.5.2017 respectively. By the same orders, these writ petitions were tagged with thebatch of matters referred to a larger bench.

## I. SCOPE OF HEARING

4. The matter is placed before this 5-Judge benchto consider whether Part III of the Constitution of India protects the right to privacy as contended by the petitioners on the strength of over 30 judgments of this Court or whether this issue needs to be authoritatively determined by a bench comprising *more* than 5 Judges.
5. The petitioners submit that the present bench of 5 Judges can authoritatively affirm that the right to privacy is guaranteed under Part III of the Constitution and there is no necessity to refer the case to a larger bench.

## II. GLOBAL PERSPECTIVE ON THE RIGHT TO PRIVACY

6. The Right to privacy is an internationally recognised human right and is protected in almost all liberal democracies either constitutionally or statutorily. The United Nations has emphasised that States must respect international human rights obligations regarding the right to privacy.
7. A human right is enjoyed by every human being by virtue of his or her existence. It depends on no instrument or charter. A human right is enjoyed by a person by being alive. The human right to privacy in India is protective under Articles 14, 19 and 21 of the Constitution of India whether the right to privacy is violated in a particular case, depends on the fact of that case.
8. The Report of the United Nations Special Rapporteur (Joseph A. Cannataci) on the Right to Privacy dated 8.3.2016 states that Article 12 of the Universal Declaration of Human Rights, 1948 (the “UDHR”) and Article 17 of the International Covenant on Civil and Political Rights, 1966 (the “ICCPR”) constitute the basis of the right to privacy in international human rights law. Taken together with a number of other international and national legal instruments including constitutions and legislation, there exists world-wide, a considerable legal framework for the protection and promotion of privacy.

### III. THE EXISTENCE OF A 'RIGHT TO PRIVACY' IS NOT DISPUTED

9. The existence of a "right to privacy" particularly in the context of the Aadhaar programme and the Aadhaar Act, is *not* a disputed issue between the parties. The Aadhaar Act itself acknowledges the existence of this right as is evident from the following:

- (i). Chapter VI of the Aadhaar Act purports to provide a mechanism for the protection of identity information and authentication records collected under the Aadhaar Act and restrictions on the sharing of such information.
- (ii). Section 30 of the Aadhaar Act provides that biometric information (photographs, fingerprints and iris scans) collected and stored under the Aadhaar Act will be deemed to be "*sensitive personal information*".
- (iii). Sections 37 to 40 of the Aadhaar Act provide penalties for unauthorised disclosure and use of identity information.
- (iv). The Statement of Objects and Reasons in respect of the Aadhaar Bill, *inter alia*, provides:

*"The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Bill, 2016 inter alia, provides for establishment of Unique Identification Authority of India, issuance of Aadhaar number to individuals, maintenance and updating of information in the Central Identities Data*

*Repository, issues pertaining to security, privacy and confidentiality of information as well as offences and penalties for contravention of relevant statutory provisions.”*

(Emphasis Supplied)

10. Further, as recorded in paragraph 50 of the judgment of the Supreme Court dated 9.6.2017 in *Binoy Viswam v. UOI* (W.P. (Civil) No. 247 of 2017), relating to the linking of PAN cards and Aadhaar Numbers, the Union’s contention was that the right to privacy is not absolute.
11. In view of the aforesaid, there is no controversy between the parties that a right to privacy exists, but only whether it is protected under Part III of the Constitution of India.

#### IV. RECOGNITION OF THE RIGHT TO PRIVACY UNDER PART III

12. While numerous Supreme Court judgments recognise diverse facets of what broadly falls under the right to privacy, since 1975 there is an unbroken line of decisions that expressly recognises the existence of a right to privacy as being protected under Part III of the Constitution, more specifically Article 21.
13. In *Gobind v. State of Madhya Pradesh* ((1975) 2 SCC 148 – 3 Judge) the Court held:

*“14. Subba Rao, J. writing for the minority [in Kharak Singh], was of the opinion that the word “liberty” in Article 21*

*was comprehensive enough to include privacy also. He said that although it is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the right is an essential ingredient of personal liberty, that in the last resort, a person's house, where he lives with his family, is his "castle", that nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy and that all the acts of surveillance under Regulation 236 infringe the fundamental right of the petitioner under Article 21 of the Constitution..."*

*23...Individual autonomy, perhaps the central concern of any system of limited Government, is protected in part under our Constitution by explicit constitutional guarantees. In the application of the Constitution our contemplation cannot only be of what has been but what may be. Time works changes and brings into existence new conditions. Subtler and far reaching means of invading privacy will make it possible to be heard in the street what is whispered in the closet. Yet, too broad a definition of privacy raises serious questions about the propriety of judicial reliance on a right that is not explicit in the Constitution. Of course, privacy primarily concerns the individual. It therefore relates to and overlaps with the concept of liberty. The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right. Privacy interest in autonomy must also be placed in the context of other rights and values."*

14. In *R. Rajagopal v. State of Tamil Nadu* ((1994) 6 SCC 632 – 2 Judge) the Court explained the contours of the right to privacy:

*"9. The right to privacy as an independent and distinctive concept originated in the field of Tort law, under which a new cause of action*



*for damages resulting from unlawful invasion of privacy was recognised. This right has two aspects which are but two faces of the same coin — (1) the general law of privacy which affords a tort action for damages resulting from an unlawful invasion of privacy and (2) the constitutional recognition given to the right to privacy which protects personal privacy against unlawful governmental invasion. The first aspect of this right must be said to have been violated where, for example, a person's name or likeness is used, without his consent, for advertising — or non-advertising — purposes or for that matter, his life story is written — whether laudatory or otherwise — and published without his consent as explained hereinafter. In recent times, however, this right has acquired a constitutional status. We shall proceed to explain how? Right to privacy is not enumerated as a fundamental right in our Constitution but has been inferred from Article 21.*

*26. We may now summarise the broad principles flowing from the above discussion:*

*(1) The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a “right to be let alone”. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent — whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position*

*may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy...*"

15. In *PUCL v. Union of India* ((1997) 1 SCC 301 – 2 Judge) the Court held:

*"14. Article 21 of the Constitution has, therefore, been interpreted by all the seven learned Judges in Kharak Singh case [(1964) 1 SCR 332 : AIR 1963 SC 1295] (majority and the minority opinions) to include that "right to privacy" as a part of the right to "protection of life and personal liberty" guaranteed under the said Article.*

*17. We have, therefore, no hesitation in holding that right to privacy is a part of the right to "life" and "personal liberty" enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy, Article 21 is attracted. The said right cannot be curtailed "except according to procedure established by law.*

*18. The right to privacy — by itself — has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case. But the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as "right to privacy". Conversations on the telephone are often of an intimate and confidential character. Telephone conversation is a part of modern man's life. It is considered so important that more and more people are carrying mobile telephone instruments in their pockets. Telephone conversation is an important facet of a man's private life. Right to privacy would certainly include telephone conversation in the*

*privacy of one's home or office. Telephone-tapping would, thus, infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law.*

16. In *Mr. X v. Hospital Z* ((1998) 8 SCC 296 – 2 Judge) the Supreme Court discussed the right to privacy:

*“21. Right to privacy has been culled out of the provisions of Article 21 and other provisions of the Constitution relating to the Fundamental Rights read with the Directive Principles of State Policy. It was in this context that it was held by this Court in Kharak Singh v. State of U.P. [AIR 1963 SC 1295 : (1964) 1 SCR 332] that police surveillance of a person by domiciliary visits would be violative of Article 21 of the Constitution. This decision was considered by Mathew, J. in his classic judgment in Gobind v. State of M.P. [(1975) 2 SCC 148 : 1975 SCC (Cri) 468] in which the origin of “right to privacy” was traced and a number of American decisions, including Munn v. Illinois [94 US 113 : 24 L Ed 77 (1877)] , Wolf v. Colorado [338 US 25 : 93 L Ed 1782 (1949)] and various articles were considered and it was laid down ultimately, as under: (SCC p. 157, para 31)*

*26. As one of the basic Human Rights, the right of privacy is not treated as absolute and is subject to such action as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protection of rights and freedoms of others.*

*28. Disclosure of even true private facts has the tendency to disturb a person's tranquillity. It may generate many complexes in him and may even lead to psychological problems. He may, thereafter, have a disturbed life all through. In the face of these*

*potentialities, and as already held by this Court in its various decisions referred to above, the right of privacy is an essential component of the right to life envisaged by Article 21. The right, however, is not absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others.”*

17. *Ram Jethmalani v. Union of India*, ((2011) 8 SCC 1 - 2) Judge) the Court held:

*“83. Right to privacy is an integral part of right to life. This is a cherished constitutional value, and it is important that human beings be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner. We understand and appreciate the fact that the situation with respect to unaccounted for monies is extremely grave. Nevertheless, as constitutional adjudicators we always have to be mindful of preserving the sanctity of constitutional values, and hasty steps that derogate from fundamental rights, whether urged by Governments or private citizens, howsoever well meaning they may be, have to be necessarily very carefully scrutinised. The solution for the problem of abrogation of one zone of constitutional values cannot be the creation of another zone of abrogation of constitutional values.*

*84. The rights of citizens, to effectively seek the protection of fundamental rights, under clause (1) of Article 32 have to be balanced against the rights of citizens and persons under Article 21. The latter cannot be sacrificed on the anvil of fervid desire to find instantaneous solutions to systemic problems such as*

*unaccounted for monies, for it would lead to dangerous circumstances, in which vigilante investigations, inquisitions and rabble rousing, by masses of other citizens could become the order of the day. The right of citizens to petition this Court for upholding of fundamental rights is granted in order that citizens, inter alia, are ever vigilant about the functioning of the State in order to protect the constitutional project. That right cannot be extended to being inquisitors of fellow citizens. An inquisitorial order, where citizens' fundamental right to privacy is breached by fellow citizens is destructive of social order. **The notion of fundamental rights, such as a right to privacy as part of right to life, is not merely that the State is enjoined from derogating from them. It also includes the responsibility of the State to uphold them against the actions of others in the society, even in the context of exercise of fundamental rights by those others.***"

18. There are several subsequent judgments of the Supreme Court that have explained various facets of the right to privacy including autonomy, dignity, informational privacy, privacy and the right to know and privacy and confidentiality. A list of these judgments is set out in a table at Page 66/Vol. I/Petitioners' Compilation.

## V. MILESTONES IN THE EVOLUTION OF PART III

19. The evolution and the expansion of the rights guaranteed under Part III of the Constitution can be traced through the following judgements:

- (i). *A.K. Gopalan v. State of Madras* 1950 SCR 88 (6-Judges) – decided on 19.5.1950 (Page 53/Vol. I/Petitioners' Compilation)

- (ii). *M.P. Sharma and Others v. Satish Chandra and Others* 1954 SCR 1077 – (8-Judges) – decided on 15.3.1954(Page 72/Vol. I/Petitioners' Compilation)
- (iii). *Kharak Singh v. State of U.P. and Others* 1964 (1) SCR 332 (6-Judges) – decided on 18.12.1962(Page 93/Vol. I/Petitioners' Compilation)
- (iv). *RustomCavasjee Cooper v. Union of India* (1970) 1 SCC 248 (11-Judges) – decided on 10.2.1970 (Page 55/Vol. I/Petitioners' Compilation)
- (v). *Maneka Gandhi v. Union of India* (1978) 1 SCC 248 (7 Judges) – decided on 25.1.1978 (Page 57/Vol. I/Petitioners' Compilation)
- (vi). *I.R Coelho v. State of Tamil Nadu* (2007) 2 SCC 1 (9 Judges) – decided on 11.1.2007 (Page 62/Vol. I/Petitioners' Compilation)
- (vii). *Mohd. Arif v. Supreme Court of India* (2014) 9 SCC 737 (5-Judges) – decided on 2.9.2014 (Page 63/Vol. I/Petitioners' Compilation)

## VI. NO CONFLICT BETWEEN *M.P. SHARMA, KHARAK SINGH* AND THE SUBSEQUENT SUPREME COURT DECISIONS

### A. *M.P. Sharma*

20. The discussion on the fundamental right to privacy in *M.P. Sharma* was restricted in context inasmuch as it related to the State's

power to conduct search and seizure vis-a-vis Article 20 (3) and Article 19 (1) (f) of the Constitution of India.

21. The 8-Judge bench did not consider or rule upon the existence of the right to privacy under Article 21 and Article 19 (1) (a) of the Constitution of India. Examining the American Fourth Amendment, the Supreme Court merely observed that there was no fundamental right to privacy “*analogous to the American Fourth Amendment*”.

#### **B. *Kharak Singh***

22. The majority judgment of Ayyanagar J. in *Kharak Singh* struck down Regulation 236 (b) of the U.P. Police Regulations concerning domiciliary visits at night as violating Article 21, expressly recognizing the notion of privacy in the context of “*an abiding principle which transcends mere protection of property rights and expounds a concept of ‘personal liberty’ which does not rest on any element of feudalism or any theory of freedom which has ceased to be of value*” (page 349).
23. The ratio of the majority judgment in *Kharak Singh* is explained by a 5-Judge bench of the Supreme Court in *State of West Bengal v. Committee for Protection of Democratic Rights, West Bengal* ((2010) 3 SCC 571) at paragraph 60:

“It is trite that the words ‘life’ and ‘personal liberty’ are used in the article as compendious terms to include within themselves all the

*varieties of life which go to make up the personal liberties of a man and not merely the right to the continuance of a person's animal existence. (See Kharak Singh v. State of U.P.)"*

24. Further, the minority judgment of Subba Rao and Shah, JJ. in *Kharak Singh* held:

*'Indeed, nothing is more deleterious to man's physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in Article 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures. If so understood, all the acts of surveillance under Regulation 236 infringe the fundamental right of the petitioner under Article 21 of the Constitution.'*

25. The following subsequent decisions of the Supreme Court have expressly held that the minority view in *Kharak Singh* must be regarded as correct:

- (i). *RustomCavasjee Cooper v. Union of India* ((1970) 1 SCC 248) – 11-Judge(Page 55/Vol. I/Petitioners' Compilation)
- (ii). *Maneka Gandhi v. Union of India* ((1978) 1 SCC 248) – 7-Judge(Page 57/Vol. I/Petitioners' Compilation)

*"5...There can be no doubt that in view of the decision of this Court in R.C. Cooper v. Union of India [(1970) 2 SCC 298: (1971) 1 SCR 512] the minority view must be regarded as correct and the majority view must be held to have been overruled."*



- (iii). *Mohammed Arif v. Registrar General, Supreme Court* ((2014) 9 SCC 737 – 5-Judge (Page 63/Vol. I/Petitioners' Compilation))

*"26...The minority judgment of Subbba Rao and Shah, JJ. eventually became law in RustomCavasjee Cooper (Bank Nationalisation) v. Union of India, where the 11-Judge Bench finally discarded Gopalan's view and held that various fundamental rights contained in different Articles are not mutually exclusive . . ."*

*"28...The wheel has turned full circle. Substantive due process is now to be applied to the fundamental right to life and liberty"*

26. In view of the decisions in *R.C. Cooper* and *Maneka Gandhi*, delivered by benches larger than *Kharak Singh*, the majority view in *Kharak Singh* is expressly overruled.
27. Further, the decisions in *M.P. Sharma* and *Kharak Singh* were rendered on principles of constitutional interpretation set out in *A.K. Gopalan v. State of Madras* (AIR 1950 SC 27). An 11-Judge bench of the Supreme Court in *R.C. Cooper* has expressly overruled the *A.K. Gopalan* judgment (as affirmed by a 7-Judge bench in *Maneka Gandhi*).

## VII. EXPANSION OF PART III RIGHTS

28. The 11-Judge bench in *R.C. Cooper* upheld a wider and more expansive interpretation of Part III rights. The court (per J.C. Shah, J. for the majority), *inter alia*, held:

*"52...The enunciation of rights either express or by implication does not follow a uniform pattern. But one thread runs through them: they*

*seek to protect the rights of the individual or groups of individuals against infringement of those rights within specific limits. Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields: they do not attempt to enunciate distinct rights."*

*"55. We have found it necessary to examine the rationale of the two lines of authority and determine whether there is anything in the Constitution which justifies this apparently inconsistent development of the law. In our judgment, the assumption in A.K. Gopalan case that certain articles in the Constitution exclusively deal with specific matters and in determining whether there is infringement of the individual's guaranteed rights, the object and the form of the State action alone need be considered, and effect of the laws on fundamental rights of the individuals in general will be ignored cannot be accepted as correct."*

29. In *Maneka Gandhi*, the Supreme Court held:

*"5... It is indeed difficult to see on what principle we can refuse to give its plain natural meaning to the expression "personal liberty" as used in Article 21 and read it in a narrow and restricted sense so as to exclude those attributes of personal liberty which are specifically dealt with in Article 19. We do not think that this would be a correct way of interpreting the provisions of the Constitution conferring fundamental rights. The attempt of the Court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by a process of judicial construction. The wavelength for comprehending the scope and ambit of the fundamental rights has been set by this Court in R.C. Cooper case [(1970) 2 SCC 298: (1971) 1 SCR 512] and our approach in the interpretation of the fundamental*

*rights must now be in tune with this wavelength. We may point out even at the cost of repetition that this Court has said in so many terms in R.C. Cooper case [(1970) 2 SCC 298: (1971) 1 SCR 512] that each freedom has different dimensions and there may be overlapping between different fundamental rights and therefore it is not a valid argument to say that the expression “personal liberty” in Article 21 must be so interpreted as to avoid overlapping between that article and Article 19(1). The expression “personal liberty” in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19...”*

30. Further, a 9-Judge bench of the Supreme Court in *I.R Coelho v. State of Tamil Nadu* ((2007) 2 SCC 1) has held the Constitution of India is a living document and its interpretation should be dynamic and evolve with time. The Supreme Court has also held:

*“140...Article 21 is the heart of the Constitution. It confers right to life as well as right to choose. When this triangle of Article 21 read with Article 14 and Article 19 is sought to be eliminated not only the “essence of right” test but also the “rights test” has to apply, particularly when Kesavananda Bharati [(1973) 4 SCC 225] and Indira Gandhi [1975 Supp SCC 1] cases have expanded the scope of basic structure to cover even some of the fundamental rights.”*

## VIII. RIGHT TO PRIVACY IN THE POST - R.C. COOPER ERA

31. In the aforesaid background regarding the interpretation of Part III rights and particularly Article 21, the decision of the Supreme Court in *Selvi v. State of Karnataka* ((2010) 7 SCC 263 – 3-Judge) and its express assertion of a fundamental right to privacy is extremely important.
32. In *Selvi*, the Court considered the right to privacy exhaustively in paragraphs 204-226 (pages 363-370) of the judgment. The decision dealt with *M.P. Sharma*, *Kharak Singh* and *Maneka Gandhi* and held:

*“209...Following the judicial expansion of the idea of ‘personal liberty’, the status of the ‘right to privacy’ as a component of the Article 21 has been recognized and reinforced’.*

...

*“225. So far, the judicial understanding of privacy in our country has mostly stressed on the protection of the body and physical spaces from intrusive actions by the State. While the scheme of criminal procedure as well as evidence law mandates interference with physical privacy through statutory provisions that enable arrest, detention, search and seizure among others, the same cannot be the basis for compelling a person “to impart personal knowledge about a relevant fact”. The theory of interrelationship of rights mandates that the right against self-incrimination should also be read as a component of “personal liberty” under Article 21. Hence, our understanding of the “right to privacy” should account for its intersection with Article*

*20(3)...A conjunctive reading of Articles 20(3) and 21 of the Constitution along with the principles of evidence law leads us to a clear answer. We must recognise the importance of personal autonomy in aspects such as the choice between remaining silent and speaking. An individual's decision to make a statement is the product of a private choice and there should be no scope for any other individual to interfere with such autonomy, especially in circumstances where the person faces exposure to criminal charges or penalties.*

*226. Therefore, it is our considered opinion that subjecting a person to the impugned techniques in an involuntary manner violates the prescribed boundaries of privacy. Forcible interference with a person's mental processes is not provided for under any statute and it most certainly comes into conflict with the "right against self-incrimination". However, this determination does not account for circumstances where a person could be subjected to any of the impugned tests but not exposed to criminal charges and the possibility of conviction. In such cases, he/she could still face adverse consequences such as custodial abuse, surveillance, undue harassment and social stigma among others. In order to address such circumstances, it is important to examine some other dimensions of Article 21."*

33. Even prior to *Selvi*, in *District Registrar v. Canara Bank* ((2005) 1 SCC 496), a 2-Judge bench of the Supreme Court (after considering the judgments in *M.P. Sharma* and *Kharak Singh*) held:

*"39...the right to privacy has been implied in Articles 19 (1) (a) and (d) and Article 21...*

*"40. A two-Judge Bench in R. Rajagopal v. State of T.N. [(1994) 6 SCC 632] held the right of privacy to be implicit in the right to life*

*and liberty guaranteed to the citizens of India by Article 21. "It is the right to be let alone." Every citizen has a right to safeguard the privacy of his own. However, in the case of a matter being part of public records, including court records, the right of privacy cannot be claimed. The right to privacy has since been widely accepted as implied in our Constitution, in other cases, namely, People's Union for Civil Liberties v. Union of India [(1997) 1 SCC 301] , 'X' v. Hospital 'Z' [(1998) 8 SCC 296] , People's Union for Civil Liberties v. Union of India [(2003) 4 SCC 399] and Sharda v. Dharmpal [(2003) 4 SCC 493])."*

34. These decisions, subsequent to *M.P. Sharma* and *Kharak Singh*, reinforced the right to privacy after due consideration of the existing case law. The Supreme Court over the last four decades has consistently recognised the right to privacy.
35. The *ratio decidendi* of previous decisions must be determined in the context of the understanding of subsequent benches. Salmond on Jurisprudence, (P.J. Fitzgerald, 12th Edition) at pages 178-179 states:

*"But while the freedom to distinguish previous decision makes the operation of precedent more flexible, it has given rise to the view that the ratio decidendi of a case is in fact what later cases consider it to be. . . Cases cannot be looked at in isolation but must be interpreted in the light of later authority which may have widened, restricted, distinguished or explained them..."*

## IX. INTERNATIONAL NORMS ON THE RIGHT TO PRIVACY

### A. *International instruments*

36. The right to privacy is internationally recognised as a fundamental human right and has been incorporated as such in the following:

- (i). Article 12 of the Universal Declaration of Human Rights, 1948 ('UDHR') provides:

*"Article 12*

*No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."*

(Page 378/Vol. II/Petitioners' Compilation)

- (ii). Article 17 of the International Covenant on Civil and Political Rights, 1966 ('ICCPR') provides:

*"Article 17.*

*1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*

*2. Everyone has the right to the protection of the law against such interference or attacks."*

(Page 372/Vol. II/Petitioners' Compilation)

India signed and ratified the ICCPR on 10.4.1979 without any reservation with respect to Article 17.

(iii). UN General Assembly Resolution No. 28/16 dated 1.04.2015, appointing the Special Rapporteur on the Right to Privacy along with his Report on the Right to Privacy dated 8.3.2016.

(iv). Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Union), 1950-- European Convention on Human Rights provides:

*"Article 8*

*Right to respect for private and family life 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

(Page 385/Vol. II/Petitioners' Compilation)

(v). Articles 7 and 8 of the Charter of Fundamental Rights of the European Union, 2012 provide:

*"Article 7*

*Respect for private and family life*

*Everyone has the right to respect for his or her private and family life, home and communications.*

*Article 8*

*Protection of personal data*



*1. Everyone has the right to the protection of personal data concerning him or her.*

*2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. 3. Compliance with these rules shall be subject to control by an independent authority.”*

(Page 391/Vol. II/Petitioners’ Compilation)

(vi). Article 8 of the Schedule I of the UK Human Rights Act, 1998 provides:

*“Article 8*

*Right to Respect for Private and Family Life*

*1 Everyone has the right to respect for his private and family life, his home and his correspondence.*

*2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”*

(Page 395/Vol. II/Petitioners’ Compilation)

37. In the absence of any domestic law to the contrary, India’s international obligations must be enforced. In this regard, reliance is placed on the following judgements:

(i). *Vishaka v. State of Rajasthan* ((1997) 6 SCC 241—3 Judge) at paragraph 7.

- (ii). *Pratap Singh v. State of Jharkhand* ((2005) 3 SCC 551—5-Judges), (per SB Sinha, J.in his part concurring opinion) at paragraph 64.

**B. Relevant literature and case law**

38. Relevant literature on the subject emphasises that privacy has a core Anglo-Commonwealth meaning which includes both informational and physical privacy. If privacy is to be protected comprehensively, both these aspects need to be protected (Page 398 at 400, 403, 412/Vol. II/Petitioners' Compilation).
39. Privacy rights, in their most elementary sense, are about restricting access to oneself or one's "private space" in which the individual is free to be him/herself. Infringement of privacy is an affront to an individual's personality and dignity and is damaged both by the violation and by the demonstration that the personal space is not inviolate. This idea of privacy as the protection of an "inviolable personality" was articulated by Samuel Warren and Louis Brandeis in 1890 and they defined privacy as "the right to be let alone" (Page 463 at 463, 465, 475, 481/Vol. II/Petitioners' Compilation).
40. Over the next century, the right of privacy evolved from a tortious remedy to a statutory and constitutional right providing protection against and control over unwanted access to the physical self as well as personal information. Alan Westin's oft-cited definition

describes privacy as *“the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.”* (Page 398 at 405/Vol. II/Petitioners’ Compilation).

41. The modern conception of privacy law is formulated in response to new technologies and practices by businesses and governments that enhance their power by giving rise to enormous data gathering and data analysis, without means of oversight or accountability (Page 435 at 461/Vol. II/Petitioners’ Compilation).
42. In view of this, privacy rights against the government demand that state power is limited and unobtrusive in a manner that liberal democracy requires. As Gary Marx argues, *“...a thread running through all totalitarian systems from the prison to the authoritarian state is lack of respect for the individual’s right to control information about the self. It has been said that the mark of a civilization can be seen in how it treats its prisoners; it might also be seen in how it treats personal privacy.”* Thus, privacy rights protect against totalitarian governments (Page 435 at 437, 438, 457/Vol. II/Petitioners’ Compilation).
43. Scholars have endorsed a presumption in favour of liberty which places the burden of proof on the State to justify any interference. Accordingly, *“...the question of justice is not, why privacy, but rather why*

*not?...Coercion, not privacy or private choice, needs legitimizing.” (Page 435 at 444-445/Vol. II/Petitioners’ Compilation).*

44. Further, the highest courts across jurisdictions have recognised the individual’s right to privacy against the State as well as private bodies. The most recent international judgments in this regard are:
  - (i). Court of Justice of European Union – *Regina v. Secretary of State for the Home Department*, [2017] 2 W.L.R. 1289
  - (ii). US Supreme Court - *Obergefell v. Hodges, Director, Ohio Department of Health*, Judgment dated 26.06.2015
  - (iii). UK Supreme Court—*Regina v. Commissioner of Police of the Metropolis (Liberty and another)*, [2011] 1 W.L.R. 1230
  - (iv). Canadian Supreme Court—*R v. Spencer*, 2014 SCC 43

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